**CONSTITUTIONAL LAW—ELECTIONS—THE CONSTITUTIONAL LIMITATIONS UPON STATE REGULATION OF ITS BALLOT—*Williams v. Rhodes*, —U.S.—, *89 S. Ct. 5 (1968)*—**Ohio's election laws imposed a substantial, if not insurmountable, burden upon a new or small political party seeking to place the name of its candidate and its slate of presidential electors on the ballot. This burden, the United States Supreme Court held, violated the fourteenth amendment's equal protection clause and infringed the first amendment's guarantee of freedom of association. The Wallace case,[1] in conjunction with the parallel case, *Socialist Labor Party v. Rhodes*, — U.S. —, 89 S. Ct. 5 (1968), presented the Court with a ". . . question which may be fairly classified as one of first impression:* to what extent may a

[1] Mr. Glen A. Williams was a member of the Ohio American Independent Party and one of a number of petitioners in the case. The Party was organized during January, 1968. Following the announcement on February 8, 1968, by former Governor George C. Wallace of Alabama that he would seek election to the office of President, the Party initiated a campaign to obtain sufficient signatures on petitions to give the Party a place on the Ohio presidential ballot. Toward the end of July, 1968, 450,000 signatures had been obtained, more than the 433,100 required under Ohio law. At this time, however, the Party was informed by the Secretary of State of Ohio that due to the interaction of several provisions of Ohio's complex election laws, the deadline for filing petitions for recognition as a political party was ninety days before the date of the primary, or February 7, 1968, and not ninety days before the general election. Therefore, the Party would not be given ballot position. Six days later, on July 29, the Party brought suit in the United States District Court for the Southern District of Ohio. The three-judge court heard the case on August 19, and ten days later it ruled that the Ohio election laws were unconstitutional because they denied members of new and third parties the equal protection of the law. The District Court, however, refused to grant the full relief sought by the petitioner. It ordered only that Ohio make provision for write-in votes for Governor Wallace. Williams v. Rhodes (reported *sub. nom.* Socialist Labor Party v. Rhodes) 290 F. Supp. 983 (S.D. Ohio 1968). The following week the Party petitioned the Circuit Justice for the Sixth Circuit, Mr. Justice Stewart, for provisional relief pending an appeal. On September 10, 1968, the petition was granted and on October 7, 1968 the case was argued before the Supreme Court. The Court's opinion was handed down a week later on October 15, 1968. (The case will hereinafter be referred to as the Wallace case, and all cites will be to the Supreme Court Reporter).

* MacDougal v. Green, 335 U.S. 281 (1948), did contest the constitutionality of Illinois' system of nominating candidates representative of new political parties. However, MacDougal was decided during the reign of Colegrove v. Green, 328 U.S. 549 (1946). The advent of Baker v. Carr, 369 U.S. 186 (1962), and its progeny have substantially modified the constitutional matrix in this area. Fortson v. Morris, 385 U.S. 231 (1966), although concerning the constitutionality of state election laws, involved consideration of a State's post-election procedure, not state requirements for initial ballot qualification. [footnote by Chief Justice Warren].

State, consistent with equal protection and the First Amendment guarantee of freedom of association, impose restrictions upon a candidate's desire to be placed upon the ballot?"[2] Chief Justice Warren, in his dissenting opinion, underscored the importance of the Court's answer.

> The rationale of the opinion of the Court, based both on the Equal Protection Clause and the First Amendment guarantee of freedom of association, will apply to *all* elections, national, state, and local . . . . I think it fair to say that the ramifications of our decision may be compared to those of *Baker v. Carr*, 369 U.S. 186 (1962) . . . .[3] (Emphasis Added)

But if the Court's decision is as important as the Chief Justice believes, it is because of the question which it raises and not the answer which it gives; for

> Both the opinion of this Court and that of the District Court leave unresolved what restrictions, if any, a State can impose.[4]

Although it does not resolve the question, the decision discloses the Court's intention to extend judicial review of the electoral process another step beyond *Baker v. Carr*,[5] for, had it wished to, the Court could have disposed of the case on alternative grounds without reaching the constitutional question. It is, therefore, essential to examine the decision and form some idea of the potential maximum and the probable minimum content which the case may be given.

An understanding of the nature and origin of the statutory maze which controlled Ohio's presidential ballot is important to an understanding of the case.[6] Prior to 1948, Ohio, like most other states, had provided three avenues to participation in its presidential election. First, a candidate could have obtained ballot position under his name and party label[7] for a slate of electors pledged to him by filing a nominating petition, sixty days before the general election,[8] signed by ". . . qualified electors . . . not less in number than one percent

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2 Wallace, at 30 (Warren, dissenting).

3 *Id.* at 27.

4 *Id.* at 30.

5 369 U.S. 186 (1962).

6 Due to their bulk the statutes involved cannot be reproduced here. The following sections of the Ohio Revised Code Annotated (Page 1960) are directly involved: §§ 3501.10, 3517.01, 3505.03, 3505.04, 3505.10, 3505.23, 3513.11, 3513.12, 3513.14, 3513.19.1.

7 The Attorney-General of Ohio ruled that "independent" candidates were not entitled to have their party affiliation printed on the ballot, 1930 Op. A. G. Vol. 1, No. 1855. But, apparently the Secretary of State continued to print the party affiliation of "independents" through 1946, HUMMEL, OHIO ELECTION STATISTICS OF 1946 at 169.

8 § 4785-92 General Code of Ohio (Page 1945).

of the qualified electors voting at the next preceding general election for the office of governor . . . ."[9] Secondly, a party or candidate could have employed the write-in space which was provided.[10] Finally, a candidate could have obtained ballot position as the nominee of a political party.[11]

In spite of the fact that this system had worked well for over a decade, the Ohio General Assembly, probably as a reaction to the candidacy of Henry A. Wallace, began, in 1947, to enact a series of amendments to the election laws which by 1952 had completely eliminated the first[12] and second[13] avenues. Thereafter, all candidates on the Ohio presidential ballot had to be the nominee of a political party.

To be a political party, for purposes of Ohio's election laws, an organization had to comply with numerous provisions scattered throughout Title 35 of the Ohio Revised Code.[14] These provisions were designed to regulate the major established parties; they contained no provision for the formation of a new party. Prior to 1948, of course, this had not been important since new and third parties had found the provision for independent candidates adequate, and thus, only the Republican and Democratic Parties, who could comply, had to comply with these provisions. Since 1952, however, all candidates have had to be the nominee of a political party which must have complied with these provisions.

Judge Kinneary, in his dissenting opinion in the district court, gave a summary of the Ohio election laws which was adopted by the Court. Under his reading of the statutes "The two party system is not a cliche in Ohio, but a statutorily enforced fact."[15] A more liberal and far less burdensome construction of the election laws is, nevertheless, possible.[16] And, in light of the interpretation given the Ohio

9 § 4785-91 General Code of Ohio (Page 1945).

10 § 4785-98 General Code of Ohio (Page 1945).

11 § 4785-91 General Code of Ohio (Page 1945).

12 §§ 4785-107 and 4785-91 General Code of Ohio (Page Supp. 1950).

13 OHIO REV. CODE ANN. § 3505.03 (Page 1960).

14 OHIO REV. CODE ANN. § 3517.01-.03 (Page 1960).

15 Williams v. Rhodes, 290 F. Supp. 983 (S.D. Ohio 1968) (Kinneary, dissenting).

16 Judge Kinneary, in his dissenting opinion, implicitly assumed that failure to comply with any or all of the provisions governing political parties would automatically have resulted in a denial of ballot position. This result, however, is not expressly provided for in the statutes and the Ohio courts have decided neither what would have constituted compliance nor what the penalty would have been for non-compliance. Most of the additional requirements with which political parties had to comply were burdensome largely because of the requirement that candidates for the "mandatory"

election laws in *Beck v. Hummel*[17]—the only case involving these statutes to reach the Ohio Supreme Court since the post 1947 amendments were initiated—it is quite likely that these laws would have received a more liberal interpretation in the Ohio courts. In the *Beck* case, the court said

> All election statutes should be liberally interpreted in favor of the right to vote. . . . [and later in the opinion] In the interpretation of statutes it is the duty of the courts, if possible, to give them an interpretation and construction which will accord with common sense and reason and not result in a grotesque absurdity.[18]

The Court's adoption of Judge Kinneary's construction of the Ohio statutes is particularly interesting since it chose not to dismiss the case under the abstention doctrine[19] on the grounds that the Ohio courts had not had an opportunity to pass on the application of the statutes involved. Due to the stringent time limit placed on the case by the late date at which suit was commenced such a disposition would, of course, have effectively denied Governor Wallace and the American Independent Party a place on the ballot. It could be argued that the shortness of time was the appellant's own fault. But, insofar as the decision rests upon the right of Ohio voters to vote for the candidate of their choice rather than the right of the appellant to associate freely and participate in the election, this resolution would have penalized the rights of the voters for the appellant's tardiness.

Although the opinion does not reveal whether a liberal construction of the Ohio statutes would have saved them, it does in-

party office could not have voted in the primary of another political party in the next preceding four years (OHIO REV. CODE ANN. § 3515.191 (Page 1960)) and the requirement that persons who signed petitions to place candidates for the "mandatory" party offices on the party's primary ballot had to be of the same political party as the candidates (OHIO REV. CODE ANN. § 3515.05 (Page 1960)). In Bouse v. Cickelli, 97 Ohio App. 43 (1954), the court construed § 3515.191 to provide that "One who votes a party ballot at a party primary becomes affiliated with that party, and such status continues and such one is presumed to remain with that party *until he changes his status by an affirmative act.*" (Emphasis added.) Under the precedent of this case it could, therefore, be argued that the signing of a petition calling for the formation of a new political party is a sufficient "affirmative act" to make one a member of the new political party. If this interpretation of the law had been adopted, the burdensomeness of the law would have been reduced considerably.

17 150 Ohio St. 127 (1948).

18 *Id.* at 139, 147.

19 *See* Railroad Commission v. Pullman, 312 U.S. 496 (1941).

dicate that a state may impose some reasonable regulations upon access to its ballot.[20] The question is, what are they? Unfortunately, the case does not answer that question. The majority opinion consistently treats the sundry provisions of the Ohio law as a package; it never delineates which requirement or requirements of the many involved render the package unconstitutional:

> Together these various restrictive provisions make it virtually impossible for any party to qualify on the ballot except the Republican and Democratic Parties.[21]

The Chief Justice's dissenting opinion called attention to this aspect of both Justice Black's opinion and the district court's opinion:

> Although both opinions treat the Ohio statutes as a "package," giving neither Ohio nor the Courts any guidance, each contains intimations that a State can by reasonable regulation condition ballot position upon at least three considerations—a substantial showing of voter interest in the candidate seeking a place on the ballot, a requirement that this interest be evidenced sometime prior to the election, and a party structure demonstrating some degree of political organization.[22]

But, not only has the court declined to reveal the content of its decision by refusing to state with particularity the aspects or requirements of the Ohio law which created the unconstitutional burden, it has not even revealed the standard against which restrictions are to be judged. The case does make clear, however, that a State may not effectively bar a new or third party from any possibility of participation in the election process. Beyond this absolute minimum a more detailed examination of the case is necessary to suggest the potential maximum and the probable minimum effect which the case may be given.

Article II, section I of the United States Constitution provides that "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . ." Although this may appear to be a plenary grant to the States, Justice Black holds that, like other express grants of power, this grant

> . . . may not be exercised in a way that violates another specific provision of the Constitution. (and therefore) . . . no State can pass a law regulating elections that violates the Fourteenth

20 Wallace at 12.

21 *Id.* at 7-8.

22 *Id.* at 30-31 (Warren, dissenting).

> Amendment's command that 'No State shall . . . deny to any person . . . the equal protection of the laws.'[23]

The basic difficulty with the Court's opinion arises, however, when it declares

> In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances of the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. [*see, e.g., Carrington v. Rash,* 380 U.S. 89 . . . (1965); *Skinner v. State of Oklahoma* . . . 316 U.S. 535 (1942)] In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. [*United Mine Workers, Dist. 12* v. *Illinois State Bar Assn.,* 389 U.S. 217 . . . (1967); *NAACP* v. *Button,* 371 U.S. 415 . . . (1963); *NAACP* v. *State of Alabama ex. rel. Patterson,* 357 U.S. 449 . . . (1958)].[24]

This enigmatic analysis presents a problem, for it merges several different rights making it difficult to ascertain what rights Ohio's laws infringed. First, the opinion seems to state that a "right of qualified voters" exists independent of the right of individuals to freely associate. The opinion, unfortunately, does not give this idea separate treatment in its analysis, and it is impossible to determine if it regards this "right" as supplying a sufficient independent basis for its decision. It would, of course, be helpful to know where in the constitution this "right" arises. Is this a penumbral right engendered by the equal protection clause, or is it in some way a derivative of the first amendment?

Secondly, the opinion suggests that, in this case, a denial of freedom of association has resulted in a denial of equal protection. The difficulty with this approach is that the freedoms protected by the equal protection clause and the first amendment, though not mutually exclusive, are clearly disjunctive. A violation of either of these freedoms may occur without a violation of the other. If, therefore, the Ohio election laws violated the first amendment freedom of association, they were ipso facto unconstitutional and the fact

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23 *Id.* at 9-10.

24 *Id.* at 10.

that they also violated the constitutional guarantee of equal protection was superfluous.

Justice Black, however, having initially framed the question in mixed terms, continued to discuss the case in those terms, and he concludes his discussion of the substantive issues in the case by declaring

> But here the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause.[25]

Since the traditional standard against which state action which infringes first amendment freedoms have been judged has been different than the standard against which state classifications which infringe equal protection have been judged, it is important to determine which of the two freedoms, merged in the Court's analysis, is the basis for the decision. The equal protection clause, as the opinion expressly recognizes, does not protect citizens from all classifications by the state, it only protects them from invidious or unreasonable classification. The reasonableness of a classification depends upon whether it is rationally related to the achievement of a legitimate state interest.[26] First amendment freedoms, on the other hand, have, as the Court also notes, been considered ". . . among our most precious freedoms . . ." and any infringement of these by a state is permitted only upon a showing of a compelling state need.[27]

Unfortunately, the two concurring opinions do not clarify the ambiguity inherent in the Court's analysis. Justice Douglas, though he discusses the guarantee of equal protection, makes it quite clear that he regards this as a first amendment case.

> The First Amendment, made applicable to the States by reason of the Fourteenth Amendment, lies at the root of these cases.[28]

Douglas has in the past consistently refused to allow any infringement of first amendment freedoms under any circumstances, and it may be the suggestion to the contrary in the Court's opinion was the reason for his separate opinion. This explanation might be entirely adequate were it not for the fact that Douglas also joined the Court's

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25 *Id.* at 12.

26 *Id.* at 21 (Stewart, dissenting, citing McGowan v. Maryland, 366 U.S. 420 (1961)).

27 *Id.* at 11, citing NAACP v. Button, 371 U.S. 415 (1963).

28 *Id.* at 14 (Douglas, concurring).

opinion and for the fact that Justice Black has in the past shared Douglas' view that first amendment freedoms were inviolable. Indeed, in asserting the absoluteness of these rights it is Black's dissenting opinion in *Konigsberg v. State Bar*[29] which Douglas cites.[30] It may be therefore, that, under the circumstances, Douglas believes that Ohio has clearly violated both the equal protection clause, and the first amendment, but he is not certain that the Court's opinion rests on what to him is the more important violation.

Justice Harlan, who dissented in the June, 1964, apportionment cases[31] which were based upon the equal protection clause, concurs in the Court's decision. He makes it clear, however, that he ". . . think[s] it unnecessary to draw upon the equal protection clause."[32] He would, instead,

> . . . rest this decision entirely on the the proposition that Ohio's statutory scheme violates the basic rights of political association assured by the First Amendment which are protected against state infringement under the Due Process Clause of the Fourteenth Amendment.[33]

It should be remembered that Harlan—unlike Douglas and, at least before this decision, Black—will permit a state to limit the exercise of first amendment freedoms upon the showing of a compelling state need.

> Of course, the State may limit the right of political association by invoking an impelling policy justification for doing so.[34]

Since he finds that ". . . Ohio has been able to advance no such justification . . ." he believes that its election laws are unconstitutional.[35]

If the opinion of the Court rests upon the first amendment, why did Justice Harlan not join it? Since he is willing to permit limitations upon first amendment freedoms upon a showing of a compelling state interest the suggestion of such limitations in the Court's opinion should not have prevented his joining it, though it should have pre-

29 353 U.S. 252 (1957).

30 Wallace, at 15 (Douglas, concurring).

31 Reynolds v. Sims, 377 U.S. 533 (1964); Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Roman v. Sincock, 377 U.S. 695 (1964).

32 Wallace, at 16 (Harlan, concurring).

33 *Id.*

34 *Id.*

35 *Id.*

vented Douglas, who will not permit such limitations. This suggests that both Justice Douglas and Justice Harlan really regard the first amendment language in the majority opinion as dicta and assume that the majority based its decision upon the equal protection clause.

A great deal of light could have been shed upon the question of the standard to be applied by a decision on the merits in the parallel case, *Socialist Labor Party v. Rhodes*.[36] The Court, however, ignoring the Socialist's prayer for declaratory relief, refused to grant additional relief on the grounds that, whereas the American Independent Party had immediately appealed the district court's grant of relief, the Socialists had waited until several days after Mr. Justice Stewart had held a hearing in the American Independent Party case and had ordered additional provisional relief, and that in the interval it had become impossible for Ohio to comply without seriously disrupting its election. Both Douglas and Harlan, who regard Ohio's election laws as a violation of the first amendment, make it clear that, in spite of the fact that it is too late to grant actual relief, they would grant declaratory relief.[37] Justice Harlan, in fact, expressly states that the state has failed to demonstrate a compelling interest sufficient to overcome the exercise of the Socialist's political rights.[38]

In spite of the Court's uncertainty over the standard it shall apply, its resolution to extend judicial protection to all aspects of the electoral process is indicated by the fact that the case could have been disposed of on alternative grounds without reaching the constitutional question. First, as was noted above, the case could have been dismissed under the abstention doctrine. This disposition would, of course, have effectively denied the American Independent Party any relief since the Ohio courts could not have heard the case in time for the election.

The Court, on the other hand, could have granted the Party the relief it sought on the technical grounds that when it appealed the lower court's grant of relief, the State of Ohio did not file a cross appeal challenging the lower court's determination that the Ohio election laws violated the equal protection clause. Thus, the only question technically before the Court was whether or not the district court had breached its discretion in granting only write-in relief. The Court could have, therefore, simply concluded that under the present circumstances, no candidate could hope to win by way of

36 89 S. Ct. 5, — U.S. — (1968).

37 Wallace at 15 (Douglas, concurring); Wallace at 18 (Harlan, concurring).

38 Wallace at 19 (Harlan, concurring).

write-in votes, and thus the relief granted amounted to no relief at all. The failure to grant adequate relief could have been held to be a breach of the lower court's discretion. The Supreme Court could have then granted the only effective relief—ballot position—without reviewing the district court's decision on the constitutionality of Ohio's election laws.

If the Court felt that a disposition of a case of such significance on technical grounds would have been ill advised, one additional disposition which would have had only minor constitutional significance was available. Under the Ohio election laws once a political group became a political party it remained one so long as it continued to poll ten per cent of the vote cast for the office of governor at each election.[39] To become a political party, however, a group had to secure signatures equal to fifteen per cent of the vote.[40] This disparity could have been found to violate the equal protection clause.

The Court may have chosen to reject this solution because it might have implied an acceptance by the Court of the ten percent requirement. By not relying on this disparity, however, the Court lost the only disparity in the treatment of different groups which appears on the face of the Ohio statutes. For aside from that disparity in treatment the Ohio law seems to treat all groups equally. Thus the invidious discrimination which the Court finds in the Ohio laws must arise from the failure of the laws to recognize the differences between various groups and make provisions for these differences. This may reveal one reason why the Court fails to state the applicable standards, since it is difficult to say how much and what kinds of differences exist between groups and how much or what kinds of difference in treatment the law must provide for in order to render them equal.

The three dissenting opinions, by Chief Justice Warren, Justice Stewart and Justice White, reflect the same uncertainty as to the constitutional infirmity in the Ohio law that the majority opinion shows. The Chief Justice argues that since the American Independent Party did not make a real effort to comply with Ohio's election laws and did not seek timely relief in the courts, the Court should not grant additional relief in the eleventh hour. The lateness of the hour is insufficient justification, in Warren's opinion, for ignoring the Court's traditional practice of abstention. Even in first amend-

39 OHIO REV. CODE ANN. § 3517 (Page 1960).

40 *Id.*

ment cases,[41] involving a substantial antecedent question of state law, he notes, the Court has previously ". . . tolerated a temporary dilution of voting rights to protect the legitimate interest of the States in fashioning their own election laws. . ."[42]

The Chief Justice is also critical of the Court's failure to establish a clear standard for determining the constitutionality of the restrictions in this and similar cases, and he would have remanded the *Socialist Labor Party* case to insure the development of greater clarity.

> Whatever may be the applicable constitutional principles, [the parties] . . . are entitled to know whether any of the various provisions attacked in this litigation do comport with constitutional standards. As demonstrated by *Zwickler v. Koota*, 289 U.S. 241 (1967), this matter should be first resolved by the court below. Given the magnitude of the questions presented and the need for unhurried deliberation, I would dispose of the Socialist Labor Party's request for declaratory relief in a manner consistent with *Zwickler* by a remand to the District Court for a clearer determination of the serious constitutional questions raised in these cases.[43]

Justice Stewart in his dissenting opinion disagrees with several important conclusions reached by the majority. He is particularly concerned with the Court's failure to analyze and resolve the apparent conflict between the grant of power to the states to choose electors in article II, section I, clause 2 and the equal protection clause. His analysis suggests that the Court's opinion may represent either the victory of form over substance or implicit over-ruling of two cases.

The majority opinion, as we noted above, assumes that the grant of power to the state legislatures in article II, section I is in conflict with the equal protection clause. Justice Stewart believes that the two provisions are not in conflict. He believes that this grant, like all other constitutional grants, establishes an area of legitimate state interest. In this case, strange though it may sound today, the legitimate interest is the right of the state legislatures to select presidential electors without reference to the momentary popular will. The state may, therefore, further this interest by means of classifications reasonably calculated to accomplish this. It does not mean,

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41 Harrison v. NAACP, 360 U.S. 167 (1962).

42 Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964). Davis v. Mann, 377 U.S. 678 (1964).

43 Wallace at 31 (Warren, dissenting).

of course, that under the pretense of serving such an interest the state may employ invidious classifications.

Thus, Stewart's analysis does not suggest that the state could discriminate against a minority group such as Negroes by saying that no Negro could be an elector since there would be Negroes who would be willing as electors to vote in a manner directed by the legislature, and therefore, this classification would not be rationally related to the achievement of the legitimate state interest established by the constitutional grant.

Justice Stewart is arguing that the Ohio election laws challanged in this case are simply part of a scheme, albeit, an intricate and complex one, which is reasonably calculated to achieve the legitimate state interest created by article II, section I.

In connection with this analysis it should be noted that the court did not, at least explicitly, overrule either *McPherson v. Blacker,*[44] or *Fortson* v. *Morris.*[45] The first of these cases recognized that a state need not choose its electors by means of an election. Nevertheless, the Court seems to agree with Justice Douglas' conclusion that:

> It is unnecessary in this case to decide whether electors are state rather than federal officials, whether States may select them through appointment rather than by popular vote, or whether there is a constitutional right to vote for them. For in this case Ohio has already provided for them to be chosen by right of popular sufferage. Having done so, the question is whether Ohio may encumber that right with conditions of the character imposed here.[46]

Exactly why a state may not impose restrictions upon participation in an election which it never needed to hold is not explained. It may be that the Court, in light of the recent apportionment cases, believes that the only rational election is an open election under the one man one vote principle.

In *Fortson* the Court allowed the state legislature to pick the governor when the general election produced no candidate with a majority. If that can be done pursuant to the Constitution of the State of Georgia, it is difficult to understand why similar results cannot be achieved under article II, section I. It, therefore, seems reasonable to suggest that this case has either tacitly overruled either

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44 146 U.S. 1 (1892).

45 385 U.S. 231 (1967).

46 Wallace at 14 (Douglas, concurring).

*Fortson* or *McPherson* or both of them or that it has severely limited their potential application.

After dealing with the equal protection issue, Stewart notes the ambiguity in the majority and concurring opinions as to the basis of the decision.

> The Court's opinion appears to concede that the State's interest in attempting to ensure that a minority of voters do not thwart the will of the majority is a legitimate one, but summarily asserts that this legitimate interest cannot constitutionally be vindicated. That assertion seems to echo the claim of my concurring Brethern—a claim not made by the appellants—that Ohio's statutory requirements in some way infringe upon First Amendment rights.[47]

But, even if Ohio's laws do in some way infringe upon the freedom of association, Stewart feels that the infringement is not substantial enough to be constitutionally fatal. He argues that two conditions must be met before there can be a finding of a violation of the first amendment. First, it must be shown that the application of the statute will clearly result in a considerable impairment of a first amendment freedom. Secondly, it must be demonstrated that the state interest being served is not insubstantial in the context presented. This was in fact, Stewart argues, the test applied in *NAACP v. Alabama*[48] and *Bates v. Little Rock*[49] cited by the Court.

In the present situation neither of these prerequisites is, in Justice Stewart's judgment, met. The Ohio statutes in no way seek to prevent political dissent from organizing effectively, and they leave political groups entirely free to assemble, speak, write, and proselytize. In addition, the same argument which was used to show a legitimate state interest for purposes of the fourteenth amendment is valid in this context and, therefore, the second prerequisite is not met.

Justice White's dissent is based upon the proposition that the American Independent Party and the Socialist Labor Party both failed to comply with a part of Ohio's election laws which is constitutional, as tested against the fourteenth amendment. Relief, therefore, should be denied, and the question of whether or not the Ohio election laws as a package violate the Constitution should not be reached.

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47 *Id.* at 23 (Stewart, dissenting).

48 357 U.S. 449 (1958).

49 361 U.S. 516 (1960).

> . . . there is no suggestion in the majority opinion that Ohio, merely by requiring potential candidates to participate in a primary, has acted unreasonably. . . . Nor is it held that Ohio's requirement, pursuant to this objective, that parties must show their base of popular support by obtaining the signatures of 15% of Ohio gubernatorial voters is itself unreasonable. . . . Indeed, the Party made no effort whatsoever to comply with provisions. . . . That other Ohio provisions related to later phases of the election process might have imposed unconstitutional barriers to ballot position is no reason to excuse the Independent Party from complying with those preconditions which the state may validly impose.[50]

The full significance of the Wallace case cannot, of course, be known at this time. If the case is as important as Chief Justice Warren believes, it is because it has opened to judicial review a whole range of questions concerning state regulation of the electoral process. Unfortunately, having raised these questions, the Court does not really answer them.

At the very minimum the case makes it clear that a state may not effectively bar new or third parties from any chance of participation in the electoral process. Beyond this minimum, however, it is possible, due to the ambivalent analysis employed by the Court, to argue either that the case is based upon the first amendment or that it is based upon the equal protection clause of the fourteenth amendment. The difference between this two positions is essentially the difference between permitting the state to adopt restrictions which are rationally related to the attainment of a legitimate state interest or only permitting it to adopt restrictions which are dictated by a compelling state need.

If the strict first amendment standard is ultimately applied, it would seem that the only restrictions which a state could impose would be those without which it would not be possible to hold an election. If, on the other hand, the more liberal fourteenth amendment test is eventually adopted, it is more difficult to predict the restrictions which would be permissible. Presumably, under this standard, a state could adopt some restrictions, beyond those necessary to the holding of the election, if they were rationally related to the legitimate state interest of insuring a meaningful election. In no event, of course, could a state impose as heavy a burden on new or third parties as the Court found the Ohio election laws imposed in the present case.

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[50] Wallace at 26-27 (White, dissenting).

Though it would be frivolous to argue which of these two possible standards ought to be or will be adopted by the courts, it may be useful to suggest some of the questions to which some court may have to apply one or the other of these standards. How many signatures on petitions for recognition as a political party may a state require? How long before an election may a state require nominating petitions to be filed? May a state require new parties to elect the same slate of a party officials as an old party? How many signatures may a state require before placing a question on the ballot? Must a state provide for independent candidates?

Although the answers to these and similar questions will depend upon the standard which is ultimately adopted, one thing seems clear. Under either standard, the state may not impose restrictions based upon narrow partisan interests. This alone may of course do a great deal to guarantee to each citizen the right to vote in a meaningful election.

*Joel T. Thomas*

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**THIRD-PARTY PRACTICE**—THE EFFECT OF SECTION 2309.71 OF THE OHIO REVISED CODE ON OHIO PROCEDURE.—In Ohio, section 2309.71[1] of the Ohio Revised Code became effective on June 11,

1 OHIO REV. CODE ANN. § 2309.71 (Page Supp. 1967).

(A) At any time after commencement of an action a defendant, as a third-party plaintiff, may file a petition and cause a summons to be issued and served upon any person, including a co-defendant, who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to file the third-party petition if he files it not later than ten days after he files his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim and his counterclaims against the third-party plaintiff and other third-party defendants as provided in Chapter 2309 of the Revised Code. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses and his counterclaims as provided in Chapter 2309 of the Revised Code. Any party may move to strike the third-party claim, or for its severance or separate trial. If the third-party defendant is an employee,

1968. The statute creates a formal system of impleader long needed in Ohio procedure. Prior to the enactment of the present statute, defendants who desired to bind a third-party by the judgment in the original action were required to "vouch in" the third-party,[2] and may still do so. The original defendant could vouch in a third-party by giving him timely notice of the suit and offering to let him conduct the defense. The third-party would then be bound by the adjudication of the defendant's liability, whether or not the invitation to conduct the suit was accepted. Third-party practice allows greater certainty for all parties to the action by providing for the litigation of the issue of the defendant's liability to the plaintiff in the same action as all issues arising between the defendant and the third-party defendant.

The new Ohio statute is not an innovation in the field of civil procedure. The history of third-party practice dates back to the implementation of general impleader practice in England.[3] The English statute was enacted as part of the Judicature Act of 1873.[4] The practice of impleading was adopted on a limited basis in the United States in 1883 by Federal Admiralty Rule 59, which was replaced in 1920 by Admiralty Rule 56.[5] Several state statutes[6] pro-

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agent, or servant of the third-party plaintiff, the court shall order a separate trial upon the motion of any plaintiff. A third-party defendant may proceed hereunder against any person who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

(B) When a counterclaim is asserted against a plaintiff, he may cause a third-party petition to be filed under circumstances which under division (A) of this section would entitle a defendant to do so.

The third-party practice statute should not be mistaken for OHIO REV. CODE ANN. § 2307.191 (Page Supp. 1967), the joinder of parties provision. Under the joinder statute, the plaintiff has the discretion to join one or more parties as defendants, while under the third-party statute, the defendant may implead a third-party without the consent of the plaintiff. It should also be noted that Federal Rule 13(g) provides for cross-claim for indemnity against a co-defendant, while in Ohio a provision for such a cross-claim is contained in the third-party practice statute itself.

2 Globe Indemnity Co. v. Schmidt, 142 Ohio St. 595, 603, 53 N.E.2d 790, 794 (1944); Ohio Fuel Co. v. Pace Excavating Co., 91 Ohio L. Abs. 184, 189, 187 N.E.2d 89, 93 (1963).

3 3 J. MOORE, FEDERAL PRACTICE, ¶ 14.02(2), at 441 (2d ed. 1968).

4 Supreme Court of Judicature Act of 1873, 36 & 37 VICT., c. 66, § 24(3).

5 Admiralty Rule 56, 28 U.S.C., which permitted a defendant to bring in a third-party provided that the third-party was liable to the defendant by way of contribution, indemnity, or otherwise for the claim made against him.

6 These states were New York, whose statute was passed in 1923; Pennsylvania in 1929; and Wisconsin in 1915. *See* Comment, *Third Party Practice in Missouri*, 23 MO. L. REV. 351, 353 (1958).

vided for third-party practice prior to the promulgation of original Federal Rule 14(a) in 1937.[7]

Third-party practice provides for joining actions which ought to be tried togther in order to save the time and cost of separate trials and the resulting duplication of evidence. With only one trial, identical evidence is more likely to produce consistent results.[8] This procedure also eliminates the delay between the two judgments. Where two suits are necessary, the defendant in the first is often required to satisfy the judgment prior to the determination of the indemnity issue.[9] Third-party procedure secures determination of the rights of all parties concerned in one action and binds the third-party defendant to the outcome of the main claim.[10]

Third-party practice is usually employed in the following instances: an endorser sued on a promissory note may bring in the maker of the note as a third-party defendant; a guarantor of an obligation may bring in the debtor; one who is sued for negligence may bring in a third-party on a claim of breach of warranty; or a joint tortfeasor may seek contribution from a third-party jointly and severally liable with him.[11] These situations are based on theories of either contribution, indemnity, reimbursement or warranty.[12] The third-party statute is a procedural rule and it does not give a third-party plaintiff any greater rights against a third-party defendant than otherwise exist under substantive law.[13] For example, in many jurisdictions, including Ohio, there can be no contribution among joint tortfeasors. This substantive rule is not changed by a third-party practice statute or rule.[14]

With the recent adoption of the third-party practice statute in Ohio, problems arise concerning how and when to implement the act. The major problems are: (1) interpretation of ambiguous areas

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7 3 J. MOORE, *supra* note 3, ¶ 14.01, at 411.

8 3 J. MOORE, *supra* note 3, ¶ 14.04, at 501.

9 Glens Falls Indemnity Co. v. Atlantic Bldg. Corp., 199 F.2d 60 (4th Cir. 1952).

10 *See* O'Neill v. American Export Lines, Inc., 5 F.R.D. 182 (S.D.N.Y. 1946); State *ex rel.* McClure v. Dinwiddie, 358 Mo. 15, 20, 213 S.W.2d 127, 130 (1948).

11 Holtzoff, *Entry of Additional Parties in a Civil Action, Intervention and Third Party Practice*, 31 F.R.D. 101, 105 (1963).

12 Crum, *Counter Claims and Third Party Practice Under the North Dakota Rules*, 34 N.D.L. REV. 7, 19-20 (1958); Brunsman, *Parties-Joinder and Third Party Practice*, 44 ILL. B.J. 371, 377 (1956).

13 Crum, *Counter Claims and Third Party Practice Under the North Dakota Rules*, 34 N.D.L. REV. 7, 21 (1958).

14 *Id.*

of the statute; (2) the applicable statute of limitations; (3) rules of personal jurisdiction of the third-party defendant; and (4) the proper venue.

## I. Interpretation of Ambiguous Areas

### A. *Acceleration of the Time of Impleader*

According to the statute, the third-party plaintiff may "cause a summons to be issued and served upon any person . . . who is *or may be* liable to him for all or part of the plaintiff's claim against him."[15] The statute accelerates the accrual of a right by allowing a third-party who is not yet liable to the third-party plaintiff to be impleaded. The right which is accelerated is not a right to relief but only a right to bring the third-party before the court. A third-party defendant may be impleaded even though such party's liability may not arise until the defendant suffers the loss.[16] This would be the effect, for example, in an indemnity action against a third-party defendant.[17] The third-party defendant would not be liable in an independent action brought on a indemnity agreement until the original defendant had suffered the loss. But in accordance with the statute, the time when the indemnity claim may be presented would be accelerated.

If the third-party defendant demurred to the third-party petition, it would be a matter of discretion for the court whether to adjudicate the main claim first or the third-party demurrer. In this situation as well as in most other preliminary questions involved in the third-party action, the policy of the statute must be considered. One important purpose of the statute is to provide greater certainty for the parties on the question of ultimate liability. Since the third-party claim determines who ultimately will be liable to the original plaintiff, the more reasonable alternative would be to settle the preliminary questions in the third-party claim before proceeding to trial of the main claim. This procedure would have the added

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15 Emphasis added to the Ohio third-party practice statute set out in note 1 *supra*.

16 Bill Curphy Co. v. Lincoln Bonding and Ins. Co., 13 F.R.D. 146, 149 (D. Neb. 1952).

17 Brunsman, *Parties-Joinder and Third Party Practice*, 44 Ill. B.J. 371, 379 (1956). *See also* Glens Falls Indemnity Co. v. Atlantic Bldg. Corp., 199 F.2d 60, 63 (4th Cir. 1952), which considered the view that in some situations the defendant's right to recover is contingent not only on a determination of his liability to the plaintiff but also on his satisfaction of the judgment rendered against him.

value of providing a stronger basis for settlement or defense of the main claim. The court should try to adjudicate the third-party claim first to determine who will bear the ultimate loss. This party would then assume the defense of the main claim.

B. *The Meaning of a "Claim"*

A section of the statute that may cause some misunderstanding is the phrase "who is or may be liable to him for all or part of the plaintiff's claim against him." In some jurisdictions the word "claim" has been held to be synonomous with cause of action. The result has been a rule that the defendant's claim against the third-party defendant must be identical to the cause of action of the plaintiff.[18] If the word "claim" is equated with cause of action, this interpretation would limit the use of third-party procedure to cases of indemnity for the precise claim asserted by the plaintiff,[19] and would exclude such third-party claims as breach of warranty, negligence or breach of contract. A construction which would produce this result would not be in harmony with the underlying purpose of the statute which is to dispose of all claims at one time in one suit. However, an interpretation which would allow greater consolidation of actions could greatly aid the courts in reducing docket congestion and the parties in reducing costs, delay and uncertainty.

Other courts have adopted a more liberal interpretation of the word "claim."[20] These cases hold that a third-party plaintiff whose claim is founded on a different legal theory from the main claim should not be excluded from the third-party procedure. The latter interpretation seems more reasonable, since the main claim is never completely identical to the third-party claim. This is because the third-party plaintiff must allege and prove the grounds on which the third-party defendant is liable over to the original plaintiff. This necessarily injects separate issues into the case. The issue of the availability of the third-party procedure might sensibly be determined by ascertaining whether there is a similarity of facts and issues between the two branches of the case.

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18 State *ex. rel.* McClure v. Dinwiddie, 358 Mo. 15, 213 S.W.2d 127 (1948); Crawford, *Third-Party Practice Under the Missouri Code*, 19 U. KAN. CITY L. REV. 16, 20 (1950-51).

19 Note, *Third Party Practice Under the Federal Rules of Civil Procedure*, 7 U. CHI. L. REV. 359 (1940).

20 *See* Saunders v. Goldstein, 30 F. Supp. 150 (D.C. 1939); Watkins v. Baltimore & Ohio R.R., 29 F. Supp. 700 (W.D. Pa. 1939).

C. *The Plaintiff's Claim Against the Third-Party—Compulsory or Permissive?*

The next problem to be considered is whether a plaintiff is compelled to assert any claim against the third-party defendant.[21] The Supreme Court of Missouri in *State ex. rel. McClure* v. *Dinwiddie*[22] held it is optional with the plaintiff whether to accept the new third-party defendant as an original defendant, since third-party practice is permissive rather than compulsory.[23] Federal Rule 14(a)[24] is essentially the same as the Ohio third-party practice statute, and interpretations given by the Federal courts are indicative of how the Ohio statute may be interpreted. Since the Federal Rule authorizes impleader only of a third-party who is or may be liable over to the defendant, the rule does not permit the defendant to tender a third-party to the plaintiff on impleader on the ground that the third-party rather than the defendant should be primarily liable.[25] In the Federal courts a defendant cannot compel the plaintiff to sue a third-party whom the plaintiff does not wish to sue.[26] The contention that the third-party alone is responsible to the plaintiff may be used only as a defense to the plaintiff's action and not to substitute one defendant for another.[27] It appears that a construction should be given the third-party practice statute which preserves the principle that a

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21 The language of the statute seems to be permissive rather than compulsory. The statute says that "the plaintiff *may* assert any claim against the third-party defendant arising out of the transaction . . . ." (emphasis added).

22 358 Mo. 15, 19, 213 S.W.2d 127, 129 (1948). In discussing the question under very similar statutory language, the court concluded

> However, the sounder, better reasoned and more persuasive majority view expressed in those cases is that plaintiff is not compelled to accept the tender of the third-party defendant and amend his complaint to state a claim and cause of action against the third-party defendant if he desires not to do so.

23 State *ex. rel.* McClure v. Dinwiddie, 358 Mo. 15, 19, 213 S.W.2d 127, 129 (1948).

24 FED. R. CIV. P. 14(a).

25 Hull v. United States Rubber Co., 7 F.R.D. 243 (E.D. Mich. 1945).

26 Delano v. Ives, 40 F. Supp. 672, 673 (E.D. Pa. 1941); Rutherford v. Pennsylvania Greyhound Lines, 7 F.R.D. 245 (S.D. Ohio 1945).

27 Brady v. Black Diamond S.S. Co., 45 F. Supp. 338 (S.D.N.Y. 1941). The court said at 339

> Under Rule 14(a), F.R.C.P., the defendant cannot implead the third-party defendant on the ground that the third-party defendant alone, and not the third-party plaintiff, is liable to plaintiff. This presupposes that plaintiff has sued the wrong defendant, which, properly speaking, is a defense, as plaintiff cannot recover a judgment against third-party defendant whom he has not sued.

plaintiff is free to determine the parties against whom he will assert his claim.

## II. The Statute of Limitations to be Applied

Another important question in connection with the Ohio statute concerns the applicable statutes of limitations. With respect to the third-party cause of action, it appears that the statute of limitations to be applied is the one relevant to the third-party claim, and not the one applicable to the plaintiff's claim.[28] The statute of limitations for the third-party claim often will not begin to run until a judgment has been entered against the defendant or until the defendant has paid the judgment.[29] The claim which the plaintiff asserts directly against the third-party defendant is also subject to the applicable statute of limitations. But if, at the time that the plaintiff wishes to assert the claim against the third-party defendant, the statute of limitations has run on that cause of action, the plaintiff should not be allowed to amend his petition.[30] Thus, it is possible that different statutes of limitations will apply to the various claims involved.

## III. Service of Process

The requirements of service of process must be met in a third-party claim just as in an independent action,[31] since there is no ancillary jurisdiction of the person of a third-party defendant. For this reason, there may be instances in which it will be impossible for the defendant to assert a third-party claim due to his inability to obtain service on the third-party defendant.[32]

Special problems will be encountered if the third-party defendant is a non-resident of Ohio. In such a case, the Ohio long-arm statute[33] might be used. To utilize this statute the third-party defendant must have the requisite minimum contacts with Ohio.[34] If these minimum contacts are absent, due process may prevent acquisition of personal jurisdiction in an Ohio court.[35] The third-party cause of action must be one that is specifically enumerated in the long-arm

28 Brunsman, *Parties-Joinder and Third Party Practice*, 44 Ill. B.J. 371, 380 (1956).
29 3 J. Moore, *supra* note 3, ¶ 14.09, at 534.
30 Hankinson v. Pennsylvania R.R., 160 F. Supp. 709, 710 (E.D. Pa. 1958).
31 Hook v. Hook and Ackerman, Inc., 89 F. Supp. 238, 241 (W.D. Pa. 1950).
32 Holtzoff, *supra* note 11, at 108.
33 Ohio Rev. Code Ann. §§ 2307.381-.385 (Page Supp. 1967).
34 International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
35 McGee v. International Life Insurance Co., 355 U.S. 220, 222 (1957).

statute. The Ohio long-arm statutes include different causes of action, such as the commission of a tort, the transaction of any business, or entrance into a contractual relationship.

## IV. VENUE

Some courts insist that a third-party defendant cannot be impleaded unless he could have been sued in an independent action in the forum county or district.[36] However, it is the general rule that the venue of third-party proceedings is determined by the venue of the main action. In the case of *United States* v. *Acord*,[37] the venue of an ancillary third-party claim was held to depend upon the venue in the main action even though the third-party claim could not have been maintained as an independent action because of lack of venue. Thus, it would seem that if the Ohio courts follow the ancillary approach and if service requirements[38] are complied with and venue[39] in the main action is proper, summons may be served upon the third-party defendant in any county in the state or in another state, and venue will not be in issue, having been determined by the venue of the main action. To allow a defendant to object to venue would defeat the purpose of the third-party statute, which is to secure determination of the rights of all parties in one action.

## V. CONCLUSION

Third-party practice is a much needed addition to Ohio civil procedure. A question may exist concerning the effect of the 1968 amendment[40] to the Ohio Constitution on the third-party practice statute. By authority of the Constitutional Amendment, the Supreme Court of Ohio may enact rules of practice and procedure which will supersede contradictory legislation. The legislature retains a veto over these rules, but no longer has the prime responsibility for enacting them.[41] Impleading is now a widely accepted practice and the

36 Brunsman, *supra* note 28, at 380; King v. Shepard, 26 F. Supp. 357 (W.D. Ark. 1938).

37 209 F.2d 709, 712, 714 (10th Cir. 1954).

38 OHIO REV. CODE ANN. §§ 2703.01-.27 (Page 1953); § 2307.383 (Page Supp. 1967).

39 OHIO REV. CODE ANN. §§ 2307.32-.39 (Page 1953).

40 OHIO CONST. art. IV, § 5(b) (Page Supp. 1967).

> The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right . . . All laws in conflict with such rules shall be of no further force after such rules have taken effect.

41 Milligan and Pohlman, *The 1968 Modern Courts Amendment to The Ohio Constitution*, 29 OHIO ST. L. REV. 811 (1968).

Supreme Court is not likely to change Ohio's rule. Third-party practice is a far-reaching innovation and an excellent method for avoiding circuity of action, delay, added costs, and unnecesary lawsuits. It not only a valuable procedural right of litigants, but aids the courts in reducing their already congested dockets.

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